PD-0812-17
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/3/2018
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JOSHUA GOLLIDAY	§	
APPELLANT	§	
	§	
VS.	§	**NO. PD-0812-17**
	§	
	§	
THE STATE OF TEXAS	§	
APPELLEE	§	

APPELLANT'S BRIEF ON THE MERITS

RESPONSE TO STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS EN BANC PUBLISHED OPINION IN CASE NUMBER 02-15-00416-CR, IN THE APPEAL FROM CAUSE NUMBER 1379815D IN THE 371ST JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE(S) VICKI ISAAKS & MOLLEE WESTFALL, PRESIDING

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LIST OF INTERESTED PARTIES

Pursuant to the Texas Rules of Appellate Procedure, Rule 38.1(a), Appellant lists the following persons who have an interest in the appeal for purpose of the Court's determining conflicts and recusals:

PARTIES	TRIAL COUNSEL
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LIST OF INTERESTED PARTIES (cont.)

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STATEMENT OF THE CASE

On December 12, 2014, Appellant was indicted in a one count indictment for the offense of Sexual Assault, alleged to have occurred on or about January 5, 2013. (CR. 6)

On October 19, 2015, Appellant entered his plea of Not Guilty before the court (RR. II 9) and voir dire was conducted. (RR. II 27-196) Appellant then entered his plea of Not Guilty before the jury. (RR. II 201) On October 20, the jury heard testimony. (RR. III 23-220) On October 21, the jury heard argument of counsel and began deliberations. (RR. IV 7-34) On October 22, the jury resumed deliberations and returned a verdict of Guilty. (RR. V 4-5) On October 22, the jury heard testimony at the punishment phase of the trial, as well as argument of counsel. (RR. VI 6-72). The jury assessed punishment at two years in the Institutional Division of the Texas Department of Criminal Justice, and further recommended that the sentence be suspended and that Appellant be placed on community supervision. (CR. 107) The trial court suspended the two year prison sentence and placed Appellant on probation for 7 years. (CR. 113) The same day, the trial court signed the certification of Appellant's right to appeal, certifying that this is not a plea bargain case and Appellant has the right to appeal. (CR. 112) On October 30, Appellant filed his Notice of Appeal. (CR. 122)

On October 13, 2016, a majority of a panel of the Court of Appeals at Fort Worth reversed Appellant's conviction. The State sought en banc review. On July 27, 2017, the en banc Court of Appeals withdrew its October 13, 2016 opinion and substituted its new opinion (still reversing the conviction). On February 7, 2018, this Court granted the State's petition for discretionary review.

STATEMENT OF FACTS

On January 4, 2013, the complainant lived in the Depot Apartments in downtown Fort Worth, as did Appellant's brother (but not Appellant).[1] Late in the evening, Appellant, his brother, and other friends interacted with the complainant, who had earlier been with a male companion. The complainant invited them into her apartment. Eventually, all left except Appellant and the complainant. (RR. III 200-03) The complainant asked Appellant to take her to get some cigarettes, which he did. In addition to cigarettes, the complainant picked up a movie from Red Box. When they got back to her apartment, the complainant invited Appellant inside. She began playing the movie, and they began making out. The complainant said that Appellant had sexual intercourse with her without her consent. Appellant left; the complainant followed Appellant while speaking to 911 on her phone. (RR. III 44-63) Police came, and the complainant went to the

[1] The State's brief says "Appellant was the victim's neighbor…" (page 5, footnote 1). This is not correct. Appellant's brother Daniel was the complainant's neighbor, not Appellant. See RR. III 174, 192, 195-97, 200, 204-05.

hospital where she met with a Sexual Assault Nurse Examiner. (RR. III 103-19) A detective interviewed Appellant's brother. Appellant was eventually arrested and charged with Sexual Assault. (RR. III 159-61) Appellant's brother and friends testified before the jury. (RR. III 172-206) Appellant called three of his former girlfriends to testify during the defense case, but they were not allowed to testify before the jury after the prosecution objected and the trial court sustained the objections. (RR. III 209-19)

SUMMARY OF THE ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 38.1(g), Appellant submits the following summary of the argument:

Appellant argues in his brief that the Court of Appeals was correct when it ruled that the trial court erred when it sustained prosecution objections and excluded evidence, thus limiting Appellant's right to cross-examine the complainant and the Sexual Assault Nurse Examiner, and his right to present vital defensive evidence; and the State is wrong when it contends that error was not preserved.

OVERVIEW OF THE CASE

This is a sexual assault case where the prosecutor properly noted at trial that the main issue is consent. Here, the complainant testified many times that she did not remember what happened on the night in question.

On more than one occasion, the defense sought to offer evidence which went to the heart of the consent issue. Testimony was proffered and heard by the trial court outside the presence of the jury. The prosecutor objected. The trial court sustained the prosecution objection and excluded the proffered testimony.

After hearing argument of counsel, the jury deliberated over parts of two days, and after convicting Appellant, assessed the minimum possible punishment and recommended probation.

The Court of Appeals correctly said that the trial court's rulings effectively prevented Appellant from presenting vital defensive evidence.

The State has argued on appeal that Appellant's trial counsel failed to adequately articulate Appellant's position, and the trial court did not understand that the Constitution is implicated when the actions of the prosecutor and trial judge limit Appellant's right to cross-examination.

Appellant contends that there is a pattern at work here where Appellant proffered vital testimony outside the presence of the jury, the prosecutor objected

and the trial court then sustained the objections. The jury was thus prevented from hearing vital defensive evidence and Appellant was denied his right to a fair trial.[2]

POINT OF ERROR NUMBER ONE

THE TRIAL COURT ABUSED ITS DISCETION AND ERRED WHEN IT DENIED APPELLANT THE RIGHT TO CROSS-EXAMINE THE COMPLAINANT IN VIOLATION OF APPELLANT'S CONFRONTATION CLAUSE AND DUE PROCESS RIGHTS UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS. (RR. III 86-96)

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ABUSED ITS DISCETION AND ERRED WHEN IT DENIED APPELLANT THE RIGHT TO CROSS-EXAMINE THE SEXUAL ASSAULT NURSE EXAMINER ABOUT THE COMPLAINANT'S MEDICAL TREATMENT IN VIOLATION OF APPELLANT'S CONFRONTATION CLAUSE AND DUE PROCESS RIGHTS UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS. (RR. III 132-44)

[These are the original Points of Error sustained by the Court of Appeals. (The three other Points of Error were not reached by the Court of Appeals.) The State has carved these Points of Error into five Grounds of Review, based on Appellant's alleged failure to preserve error, and the alleged failure of the Court of Appeals to follow precedent. Appellant contends specifically, the Court of Appeals did not err in its interpretation of Evidence Rule 103 and Appellate Rule 33.1, nor did the Court of Appeals conflict with precedent from this Court related to the defense objection and appellate complaint, including the reference to the "whole picture".

[2] Although the Court of Appeals correctly ruled that the trial court's rulings on the prosecution objections limiting cross-examination of the complainant and the Sexual Assault Nurse Examiner prevented Appellant from presenting vital defensive evidence, the Court of Appeals did not reach Appellant's argument that the trial court also erred when it again sustained the prosecution objections and prevented Appellant from presenting vital defensive evidence from three of Appellant's former girlfriends about Appellant's good character and the positive way he treats women. (RR. III 157-219). The Court of Appeals also did not reach Appellant's contention that that the cumulative effect of all of these errors prevented him from presenting his defense. Appellant contends that this is all part of the same pattern where Appellant sought to present vital defensive evidence for the jury's consideration, but the actions of the prosecutor and trial court prevented Appellant from presenting this vital evidence.

The Court of Appeals also did not err related to either defense offer of proof. The Court of Appeals also did not err in finding constitutional violations. All of these are inter-related and will be argued together below.]

STATEMENT OF FACTS

In the presence of the jury, the complainant testified that she had been drinking the night of the incident and was in fact intoxicated. (RR. III 38-41) By way of proffers, Appellant sought to introduce additional evidence for the jury. Outside the presence of the jury, the complainant testified that shortly after the date of the incident, she was treated at Millwood Hospital. She said that she knew that both the State and Appellant's counsel had her lengthy records from Millwood. She said that it was possible she admitted to the staff at Millwood that she had not accepted that she had been raped. She told Millwood staff that she is "a giant problem to everyone." She told Millwood staff that she had a panic attack and took Xanax to cope. She told the Sexual Assault Nurse Examiner (SANE) that she has herpes and suffers from anxiety. She said she was on medication before the incident, and that she is a recovering alcoholic and that "I drink alcohol with everything." (RR. III 86-94) The prosecutor's objections to hearsay, relevancy and 404 were sustained, and the jury was not allowed to hear any of this evidence. (RR. III 95)

After the complainant testified, the State called Jill Zuteck, the Sexual Assault Nurse Examiner. She testified that she has a bachelor's degree and also certifications that require her to keep a hundred hours of continuing education every four years and is continually educating herself on the best practices. She is also on the national state faculty from the Emergency Nurses Association which allows her to teach courses and adult and pediatric trauma classes. She is a unit-based clinical educator, so she provides education to nursing staff in the med-surg unit as well as progressive care and emergency nursing. She worked at John Peter Smith Hospital in Fort Worth from 2008-13, and now works at a hospital in Michigan. She taught trauma nursing courses for the trauma nurses at JPS and was also the training coordinator for the American Heart Association programs, which is basic life support, advance cardiac life support and pediatric advanced life support. (RR. III 98-100).

She performed the sexual assault exam on the complainant on January 5, 2013. She has done approximately 300 sexual assault exams. She has also testified in courts in both Texas and Michigan. (RR. III 100-02). On cross-examination, she said that she could not medically and definitively say that the sex in this case was not consensual, and that she was relying on the word of the complainant. (RR. III 130)

Outside the presence of the jury, the SANE testified that the complainant told the SANE that she takes Xanax and Zoloft. The SANE said that mixing Xanax with alcohol can cause certain effects, including memory distortion and black-outs, as well as dramatic mood changes. The complainant told the SANE that she has problems with anxiety. She also told the SANE that she has chronic problems with herpes. (RR. III 132-38) The SANE also testified that she prescribed four medications for the complainant: Flagyl, Suprax, Zithromax, and Phenergan. (RR. III 139-40).

Appellant argued that the SANE has seen before in her career that combining Xanax with alcohol can cause dramatic mood changes and blackouts and memory loss, and this information is relevant to explaining some of the complainant's behavior at the time of the incident, and that this ties directly to where the complainant can remember parts of the evening specifically, but cannot remember other parts. The prosecutor objected that this proffered testimony was irrelevant and a violation of Rule 404. The trial court sustained the objection and excluded the proffered testimony. (RR. III 141-43)

[The State argues in its brief that the alcohol evidence was cumulative, but did not argue that at trial. (State's brief p. 54). Appellant submits that complainant's admitted intoxication at the time of the incident, combined with her admissions that she was on medication and heard screaming in her head is not

cumulative, but instead goes to what she could properly remember from that night.]

The State qualified the SANE as an expert who has testified in two states, and now wants to say she is not qualified to discuss these medications, when she prescribed four medicines for the complainant and did not say "I don't know" when asked about Xanax and Zoloft, but instead testified about what she knew.

ARGUMENT

The Court of Appeals did follow the precedent of the Court of Criminal Appeals; and the PDR should be dismissed as improvidently granted. In the alternative, this Court should affirm the Court of Appeals.

The trial court never said "I don't understand." The trial court was present for every proffer outside the presence of the jury; the trial court heard and ruled on the State's objections.

This Court has said:

> Trials involving sexual assault may raise particular evidentiary and constitutional concerns because the credibility of both the complainant and defendant is a central, often dispositive, issue. Sexual assault cases are frequently 'he said, she said' trials in which the jury must reach a unanimous verdict based solely upon two diametrically different versions of an event, unaided by any physical, scientific, or other corroborative evidence. Thus, the Texas Rules of Evidence, especially Rule 403, *should be used sparingly* to exclude relevant, otherwise admissible evidence that *might bear upon the credibility* of

> either the defendant or complainant in such 'he said, she said' cases. And Texas law, as well as the federal constitution, requires great latitude when the evidence deals with a witness's specific bias, motive, or interest to testify in a particular fashion…the constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he *could not present a vital defensive theory*.

Hammer v. State, 296 S.W.2d 555, 561-63 (Tex. Crim. App. 2009)(emphasis added).

Here, the trial court excluded cross-examination evidence (from both the complainant and the SANE) that would bear on the complainant's credibility, even though this Court has stated that the Rules of Evidence "should be used sparingly" to exclude relevant, otherwise admissible evidence that might bear upon the credibility of the complainant. Here, the jury heard the complainant admit to much drinking on the night in question and say many times on both direct (RR. III 42-61)[3] and cross-examination (RR. III 69-86, 96-97)[4] that she could not recall or did not remember what happened.

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[3] Examples where the complainant said she could not remember on direct: what floor her apartment was on (42); if anyone gave her a cigarette (43); if Appellant entered the store (45); "I don't remember everything exactly" (related to things progressively happening after kissing) (52); where Appellant was trying to touch her (53); "I don't remember what I said. I just heard screaming in my head." (56); "I think I made [Appellant] a drink, but I don't remember." (60); does not remember what told the detective about ejaculation (61)

[4] Examples where the complainant said she could not remember on cross: did not remember telling police about talking on a phone in the stairwell (69-70); did not remember if Appellant and his friends came inside the complainant's apartment before Appellant and complainant left for the 7-11 (70-71); did not remember how the store was chosen, or by whom or whether Appellant went inside the store, or what movie was rented (72-73); did not remember

Appellant sought to introduce evidence before jurors that would help them assess the complainant's credibility, and the prosecutor objected and the trial court sustained the objections. It was the actions of the prosecution and the trial court that deprived Appellant of his right to present a defense and his right to a fair trial.

Any offer of proof on cross-examination inherently involves constitutional issues and the right to confrontation. As this Court has said:

> The Constitutional right of confrontation is violated when appropriate cross-examination is limited. The scope of appropriate cross-examination is necessarily broad. A defendant is *entitled* to pursue all avenues of cross-examination *reasonably calculated to expose* a motive, bias or interest for the witness to testify…Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is *infinite*. The rule encompasses all facts and circumstances, which when tested by human experience, *tend to show* that a witness *may* shade his testimony for the purpose of helping to establish one side of the cause only.

Carroll v. State, 916 S.W.2d 494, 497-98 (Tex. Crim. App. 1996) (citations omitted; emphasis added).

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what Appellant and complainant talked about on the way back to the apartment (74-76); did not remember who initiated the kissing (77); did not remember telling the 911 operator she did not know anything about Appellant, but it sounds accurate (77); or telling the officer where Appellant was from or where he lived (78); or talking about Appellant's family (79); or whether Ryan drove her to the police department (81); showing the detective anything on her phone, although she "might have" (81-82); did not remember whether Ryan had been a her apartment earlier in the day (83); "I honestly don't remember all the details of that day" (84); does not remember if told the detective if Appellant ejaculated (84); "I said I don't remember screaming. All I can hear is screaming in my head…I don't remember a lot of details, that is correct." (96-97)

The prosecutor argued to the jury that the State's "case is basically off of consent." (RR. IV 11). In other words, was the complainant credible when she testified that she did not give consent. Again, turning to the words of this Court:

> In a case such as this, where the *believability of the complainant* forms the *foundation* of the State's case, *Texas law favors the admissibility* of evidence that is relevant to the complainant's bias, motive, or interest to testify in a particular fashion. "[G]enerally speaking, the Texas Rules of Evidence permit [a] defendant to cross-examine a witness for his purported bias, interest, and motive without undue limitation or arbitrary prohibition….The Texas Rules of Evidence permit the defendant to cross-examine a witness for his purported bias, interest and motive *without undue limitation or arbitrary prohibition*. Rule 404(b) permits the defense, as well as the prosecution, to offer evidence of other acts of misconduct to establish a person's motive for performing some act—such as making a false allegation against the defendant. Rule 613(b) permits a witness to be cross-examined on specific instances of conduct when they may establish his specific bias, self-interest or motive for testifying. Rule 412 specifically addresses the admissibility of evidence of a victim's past sexual behavior. Such evidence is admissible if it "relates to the motive or bias of the alleged victim" or "is constitutionally required to be admitted" and if "the probative value of the evidence outweighs the danger of unfair prejudice."

Johnson v. State, 490 S.W.3d 895, 910 (Tex. Crim. App. 2016)(citations omitted; emphasis added).

Here, Appellant sought to cross-examine the complainant about her bias, motive and ability to recall the events; the prosecutor objected that the proffered testimony was hearsay, not relevant, and not admissible under Rule 404. The trial court sustained the prosecutor's objections, and specifically ruled that the court

would not allow the defense to ask the complainant about any of the matters heard by the trial court outside the presence of the jury. (RR. III 95-96).[5]

Later, Appellant sought to cross-examine the SANE; testimony was heard outside the presence of the jury and the prosecutor again objected on grounds of relevance and 404, as well as lack of expertise. The trial court again sustained the prosecution objections. (RR. III 141-44)[6]

The excluded testimony would have helped the jury evaluate the complainant's story, especially in light of how many times jurors watched her say she was intoxicated and could not recall.

And as this Court said in Virts v. State, 739 S.W.2d 25 (Tex. Crim. App. 1987): "it is still necessary to point out, for emphasis purposes, that the right of

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[5] Matters testified to by the complainant outside the presence of the jury included the fact that after this incident, she went to Millwood Hospital, first as an outpatient. She was asked about the records from Millwood and said it was possible she told Millwood staff that she had not accepted that she had been raped. (86-88). She told staff that she was a giant problem to everyone. (89). She told staff that she had a panic attack and took Xanzx to cope. "I'm a recovering alcoholic. I had a very difficult past." It was possible that she told staff that she is "a love addict and it sucks." (90-91). She gave the SANE nurse a history and said she was on Zoloft and was given Xanax. She said she has herpes and suffers from anxiety and takes anxiety medication; she was on medication before the alleged rape happened, and that she is a recovering alcoholic, she drinks alcohol with everything. (92-94).

[6] The SANE testified outside the presence of the jury that the complainant told her that she takes Xanax and Zoloft. She testified that mixing these medications with alcohol can cause memory distortion and blackouts. She has seen mixing alcohol with Xanax cause dramatic mood changes. (135-37). The complainant told the SANE that she has anxiety and a chronic problem with herpes. (138-39). The SANE prescribed medicines for the complainant: Flagyl, Suprax, Zithromax and Phenergan. (138-40). The State questioned the lack of expertise of the SANE, even though she prescribed medicines to the complainant and testified that mixing alcohol with Xanax and Zoloft can cause memory distortion and blackouts. (141).

cross-examination by the accused of a testifying State's witness includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any *impairment or disability* affecting the witness's credibility." (emphasis added.)

The main premise of the State's central argument is that due to the actions of defense counsel, the trial court and the prosecutor did not understand Appellant's contentions. Appellant submits that there is a pattern seen in this record where it is clear that the actions of the prosecutor and the trial court prevented Appellant from presenting vital defensive evidence, throughout the trial, and thus Appellant was denied his right to a fair trial.

PRESERVATION

The State argues on appeal that the trial court did not understand Appellant's position related to the proffered cross-examination testimony of the complainant and the SANE. In both of these instances, it was the objections of the prosecutor, not the defense, that were sustained. [See page 23 of the State's brief: "…nearly unimaginable that the State or the trial court understood Appellant to intend constitutional objections." This sentence from the State's brief is an example showing how the State has missed the key point here: the objections were by the

State, not the defendant. After allowing Appellant to develop a record outside the presence of the jury each time, the trial court sustained the **prosecutor's** objections. The State appears to be arguing in part that the prosecutor did not understand the prosecutor's objections.]

The Court of Appeals correctly noted the different modes of preserving error when evidence is admitted as opposed to when evidence is excluded. Evidence Rule 103 (a)(1) requires the party to object if the ruling *admits* evidence. Evidence Rule 103(a)(2) requires a party to inform the court of the substance of evidence by way of an offer of proof if the trial court ruling *excludes* evidence (as is the case here), unless the substance was apparent from the context. Here, it was the prosecutor who objected to the proffered testimony from the defense. The trial court then sustained the prosecution objections. There is no requirement that the defense attorney must then object to the trial court's sustaining of the prosecutor's objection. [The Court of Appeals did note that defense counsel's "note the exception" comment was not required.] In this case, the actions of the prosecutor and the trial court affected Appellant's substantial rights: these actions prevented him from putting on a defense; these actions affirmatively prevented the jury from hearing Appellant's vital defensive evidence. If defense attorneys will now be required to object to the prosecutor's objection (and the sustaining of that objection by the trial court), there is nothing to prevent prosecutors in the future throwing out

any imagined objection and shifting the burden to the defense to counter every prosecution objection, effectively repealing the admission/exclusion distinction in Evidence Rule 103. If this becomes the public policy in Texas, form will have effectively trumped the constitutional rights of anyone who appears as a defendant in Texas courts, resulting in much less public confidence in the Texas criminal justice system. Will Texas move to a presumption that the trial court did not understand the defense offer of proof?

Appellant submits that in addition to Evidence Rule 103, compliance has also been had with Appellate Rule 33.1 in that after each objection by the prosecutor, Appellant developed a record outside the presence of the jury showing what evidence he sought to be admitted, at which time the trial court was present and could see the complaint, and the specific grounds were apparent from the context; and the trial court did not ask for clarification and clearly sustained the prosecution objections.

Citing this Court, the Court of Appeals correctly noted that a "party need not spout magic words…to preserve an issue as long as the basis of his complaint is evident to the trial court." Bryant v. State, 391 S.W.3d 86, 92 (Tex. Crim. App.2012) (internal quotation marks and citation omitted). The trial court was present for each hearing outside the presence of the jury and was in a position to hear and understand the proffered testimony. The trial court did not hesitate or ask

for clarification when ruling that the prosecution objections were sustained. It is clear that these hearings were on cross-examination, and thus the actions of the prosecutor and the trial court limited Appellant's right to cross-examination. The law does not require defense counsel to remind the judge that this is cross-examination.

The State's Reliance on Reyna v. State[7]

Reyna is the case that the State primarily relies upon in this Court. There, the trial judge specifically asked defense counsel why he wanted to present evidence of the victim's past on cross examination. ["The purpose of bringing that in?"] Reyna at 174. Thus, the Reyna judge did not know, or it was not *apparent from the context* what was at issue. This was not the situation in the instant case. Here, the judge did not ask defense counsel why he was trying to cross examine the complainant or the SANE because it was apparent from the context. The judge did not need or ask for clarification. The context was clear; this was cross-examination which the State sought to limit. Here, defense counsel did, at the earliest opportunity, everything necessary to bring to the judge's attention the evidence rule in question, which was apparent from its context, as the trial judge asked no questions, but sustained the State's objections. The trial judge here was on notice, and therefore asked no questions, unlike the judge in Reyna.

[7] 168 S.W.3d 173 (Tex. Crim. App. 2005)

The majority in Reyna relied heavily on how they thought the defense counsel implied that the issue regarding admissibility was hearsay, not Confrontation Clause. (Defense counsel in Reyna stated that the proffered evidence was not hearsay and that it went to credibility. The majority said that "credibility" does not implicate the Confrontation Clause, but the dissent thought it did). This effectively might have confused the trial judge and denied him the opportunity to understand that the Constitution was at stake. Here, defense counsel did not do this at trial, or do anything that would have confused the trial judge. Nothing in the record here indicates that the trial judge was confused. Quite the contrary, the trial court here did not ask for clarification, but instead ruled on the prosecution objections.

The dissent in Reyna focuses primarily on how the majority's ruling ignores the second half of Rule 33.1: "Specifically, Rule 33.1 provides that error is preserved if 'the specific *grounds* [not ground] are apparent from the context.' This language, of course, implies that more than one ground may be preserved by a general request for the admission of evidence [or objection to evidence] if the grounds supporting admission are apparent from the context. The Court's holding today lops off half of the rule; that is, if there could be more than one ground for admission raised by a general argument for admission of evidence, the proponent of the evidence loses automatically, unless of course he splits hairs, something we

have said a party is not required to do," citing Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). The dissent also noted that the United States Supreme Court "reversed a conviction, without a finding of harm, based on the Confrontation Clause, where the trial court refused to permit cross-examination of a material witness as to motive and bias." Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The dissent continues: "we should be hesitant to conclude that, pursuant to a procedural rule (or a new interpretation of that rule), a defendant's request to test the credibility of the witness through cross-examination is too vague to put the trial court on notice that the defendant is invoking the protections of the Confrontation Clause," citing Douglas v. Alabama, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The dissent argues that "this Court repeatedly construes the procedural default concepts of TEX.R.APPP. 33.1 to 'protect' trial courts, as if trial judges are laymen rather than experts in law and procedure. The state and federal constitutions do not protect trial courts—rather they protect the criminally accused. U.S. CONST. amend VI; TEX. CONST. art. I, Sec. 10" Reyna at 184 (J. Holcomb, dissent).

Appellant submits that the specific grounds of the complained of excluded evidence was "apparent from the context," which is language found in both Evidence Rule 103 and Appellate Rule 33.1.

In two cases, this Court appears to have limited Reyna.

Cameron v. State, 241 S.W.3d 15 (Tex. Crim. App. 2007): "However, Reyna does not say that the proponent of evidence is required to respond to all possible objections." *Id*. at 22. In other words, defense counsel is not required to argue against objections that the State does not make. In this case, the Court focuses on how in Reyna, the defense counsel made one argument for the admission of evidence at trial and made a different argument for admission on appeal.

Clarke v. State, 270 S.W.3d 573 (Tex. Crim. App. 2008): "These cases do not stand for the proposition that a specific constitutional provision that is cited on appeal must also have been cited to the trial judge. Rather, their common rationale is that a particular argument relied upon on appeal must have been presented to the trial court. In Heidelberg[8], Reyna and Keeter[9], the constitutional provision relied upon on appeal set forth different or additional legal grounds for relief than that argued at trial. Because the trial judge had never been requested to rule on those grounds, we found the claims to be unpreserved." *Id*. at 582. Here, the Court appears to be drawing a distinction between a "particular argument" and a "specific constitutional provision." Attempting to cross-examine the SANE and the

[8] Heidelberg v. State, 144 S.W.3d 535 (Tex. Crim. App. 2004)

[9] Keeter v. State, 175 S.W.3d 756 (Tex. Crim. App. 2005)

complainant in this case inherently implicate the Confrontation Clause at trial. Appellant continues to argue the Confrontation Clause on appeal.

Here, defense counsel did not confuse the trial judge by making one argument for admission during trial and a different one on appeal - thus preventing the trial court from ruling the Confrontation Clause issue. The Confrontation Clause was apparent from the context, so arguably the trial judge DID rule on it when the court sustained the prosecution objections to the proffered cross-examination. [The trial judge clearly understood the proffer and the prosecution objections and ruled without asking for clarification.]

Nothing in the record here indicates that the trial judge was confused in any way.

The Fifth Circuit Court of Appeals has recently considered an appeal involving error preservation issues. There, the Government argued that the defendant failed to preserve his issue on appeal by not raising it before the district court. The Court said that the issue "must be raised to such a degree that the district court has an opportunity to rule on it." United States v. Soza, 874 F.3d 884, 889 (5th Cir. 2017)… "The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised." The defendant "need not cite directly to the provision at issue so long as his objection

below offered the opposing party and district court a fair opportunity to respond." The Fifth Circuit then cited United States v. Ocana, 204 F.3d 585, 589 (5th Cir. 2000) where that court had found that the issue had been preserved for appeal where the defendant did not cite to a specific Guideline section, but did "make a general objection that notified the court" of the disagreement. The Court went onto find that "Brown effectively put the Government and the court on notice…"

United States v. Lennon Ray Brown, No. 16-11340 (5th Cir. March 1, 2018).

In Reyna, the judge asked questions for clarification. That did not happen in the instant case. Should the defense attorney be expected to read the judge's mind if the judge does not ask for clarification? Or as in Brown, are the prosecutor and the trial court effectively put on notice when a record is made?

This Court has said that the standards of procedural default "are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it…" This Court went on to state that the parties should not be required to "read some special script to make their wishes known." Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). After quoting

Lankston, this Court later said: "Of critical importance is whether the trial court understood appellant's objection, including the legal basis for the objection. Where the record makes clear that the trial court understood an objection and its legal basis, a trial court's ruling on that objection will be preserved for appeal, despite an appellant's failure to clearly articulate the objection. Cofield v. State, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994). Hence appellant was not necessarily compelled to state the magic words 'I object' to preserve error." Taylor v. State, 939 S.W.2d 148, 154-55 (Tex. Crim. App. 1996).

Appellant submits that these matters were brought to the trial court's attention in compliance with Evidence Rule 103 and Appellate Rule 33.1. And as this Court has noted, the procedural default "rule is not absolute." Grado v. State, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014).

To allow the lack of the use of the magic words to prevail would serve to undermine (in the words quoted in Carroll) the "perception as well as the reality [that] fairness prevails" in our criminal justice system. Lee v. Illinois, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

When the specific basis for the objection can be determined from the context, a general objection may be enough to preserve error. The policy reason for requiring specific objections is to inform the trial judge of the basis of the

objection and allow an opportunity to rule, and to allow opposing counsel an opportunity to remove the objection or supply other testimony. "Where the correct ground of exclusion was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection." Zillender v. State, 557 S.W. 515, 517 (Tex. Crim. App. 1977), citing 1 McCormick & Ray, Evidence, Sec. 25, p. 25 (2d ed 1956).

Here, this complaint is about evidence that was excluded, after the trial court sustained prosecution objections.

If Appellant had not approached bench and developed a record, nothing is preserved. But where draw the line? Does a trial court need to hear the magic word Constitution on cross-examination to understand that the Constitution is implicated by the trial court's ruling limiting cross-examination? Should the rule in Texas be that the trial court must be reminded that cross-examination implicates the Constitution, or otherwise the trial court will not know that the trial court has limited the valuable constitutional right of confrontation by its ruling? Does this trump the right to present a defense, and for the public to have confidence that the criminal justice system does in fact produce justice? Should the focus be constitutional rights, or being sure the trial judge understands the obvious?

The purpose of the error preservation rules is to allow a trial court an opportunity to fix a complaint at trial. Here, Appellant took 15 pages developing what he wanted to present to the jury in his defense. The State objected. The trial court sustained the State's objections, thus limiting Appellant's Constitutional right to confront and cross examine the witnesses against him.

The Court of Appeals correctly noted that in this case, neither the trial court nor the parties had the benefit of the opinion in Johnson v. State, 490 S.W.3d 895 (Tex. Crim. App. 2016). There, the Court noted that "In a case such as this, where the believability of the complainant forms the foundation of the State's case, Texas law favors admissibility of evidence that is relevant to the complainant's bias, motive or interest to testify in a particular fashion." The Court noted that "An accused is given wide latitude to show any fact 'which would tend to establish ill feeling, bias, or motive for fabrication on the part of any witness testifying against the accused." Johnson at 914. Here, the complainant stated many times (as noted above) that she did not remember parts of the events of the evening. Appellant sought to introduce evidence of why that is the case. The trial court did not let the jury hear any of the proffered testimony. This was evidence that, as the Court of Appeals correctly held, was "constitutionally required to be admitted." The actions of the prosecutor and the trial court preveanted Appellant from presenting his defense to the jury.

Even though the prosecutor objected that the proffered cross-examination testimony of the complainant was not relevant, it followed directly with much of the complainant's testimony on direct: "I don't remember what I said. I just heard screaming in my head." She admitted on direct that she was intoxicated. She could not remember much of what happened. This proffered and excluded cross-examination testimony was extremely relevant under these circumstances and dove-tailed exactly with the direct. The trial court erred in sustaining the prosecution objection.

Appellant submits that in this case, the actions of the trial court reveal a pattern that denied Appellant his right to present a defense: limitations on the cross-examination of the complainant and the SANE (and the prohibition of the former girlfriend's testimony). In Jasper v. State, 61 S.W.3d 413 (Tex. Crim. App. 2001), this court considered the pattern of the trial court's actions where the defense took no preservation of error steps. Here, defense counsel did take preservation of error steps; yet the State argues that the defense did not take enough preservation steps. "If a category of error by its very utterance tends to threaten the integrity of the criminal adjudicatory process itself, we may, consistent with Marin,[10] deem it proper for appellate courts to at least consider the merits of these claims—even in the absence of a trial-level objection—and take corrective

[10] Marin v. State, 851 S.W.2d 275 (Tex. Crim. App. 1993)

measures as appropriate." Proenza v. State, ___ S.W.3d. ___, 2017 WL 5483135, 8 (Tex. Crim. App. 2017). Appellant submits that where the pattern of trial court actions prevent a criminal defendant from presenting a defense, these actions at a minimum cause the public to have less confidence in the criminal justice system, and arguably threaten the integrity of the criminal adjudicatory process itself.

Carroll also noted that the Davis[11] Court "held that the defendant's right of confrontation was paramount." Carroll at 501.

These words from Hammer (also quoted by the Court of Appeals) are extremely appropriate here: The "Texas Rules of Evidence, especially Rule 403, should be used sparingly to **exclude** relevant, otherwise admissible evidence that **might** bear upon the credibility of either the defendant or complainant in such 'he said, she said' cases. And Texas law, as well as the federal constitution, requires great latitude when evidence deals with a witness's specific bias, motive or interest to testify in a particular fashion." [emphasis added.] Here, it was the prosecutor who objected and sought to exclude relevant evidence that would bear on the credibility of the complainant who, by her own admission was intoxicated and could not remember much of the events of this "he said she said" situation. This clearly went to her bias, motive and interest to testify in a particular fashion.

[11] Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)

Public policy should, as Hammer notes, favor inclusion here, so that the public can have confidence in the criminal justice system, and that it is fair to all.

Everyone in the courtroom knew that the proffers were on cross-examination. This portion of the record is labeled cross-examination. When the prosecutor objected to the proffered cross-examination testimony, the prosecutor was attempting to limit cross-examination. When the trial court sustained the prosecutor's objections, the trial court limited Appellant's cross-examination. Any limitation of cross-examination does by definition limit the right to cross-examination and implicates the Sixth Amendment.

Should the policy of this State be that when the State objects to relevant evidence offered on cross-examination by a defendant that unless the trial court is reminded that this is occurring on cross-examination, the conviction should be upheld on appeal?

Counsel for Appellant said (in the words of Carroll), that the jury should see the "whole picture"[12] of Complainant, who testified that she did not remember the events, that she was intoxicated, and that she just heard screaming in her head. Thus at the earliest opportunity on cross-examination, Appellant brought to the attention of the trial court exactly what was being requested. This was done with

[12] Carroll at 500, citing Harris v. State, 642 S.W.2d 471, 479 (Tex. Crim. App. 1982)

sufficient specificity to make the trial court aware of the complaint. This proffered testimony did not confuse the trial judge.

This evidence was proffered to test the credibility of Complainant before the jury; this is a clear reference to the Confrontation Clause. Cross-examination is "a tool used to flesh out the truth…" C.J Rehnquist concurring in Crawford v. Washington. 541 U.S. 36, 74, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The trial judge in this case was in a position to observe the complainant admit that parts of the Millwood records were true, and deny other parts of the Millwood records; the trial judge (and the prosecutor who argued that this case comes down to the believability of the complainant) knew this was relevant information for jurors who heard the complainant admit to being intoxicated and hearing voices in her head, and not remember much from that night. The trial judge was also in a position to observe the State establish the expert credentials of the SANE, who also testified she prescribed four medications to the complainant and knew the effects of Xanax and Zoloft from her experience; and again that this was relevant to the jury that had to determine the complainant's credibility. Here, the trial court actually heard the proffered testimony, unlike in the case relied upon by the State, where a trial judge is presented with 70 pages of grand jury testimony: Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992), overruled on other grounds by Maxwell v. State 48 S.W.3d 196 (Tex. Crim. App. 2001).

Here, the rulings of the trial court violated Appellant's right to fully cross-examine and present his defense of the whole picture of the admittedly non-remembering (and admittedly intoxicated) complainant to the jury, in this case that would only live or die on her testimony. The trial court understood this.

This Court held in Bryant that magic words are not needed for error preservation. Other courts (both federal and other states) have issued similar rulings. Here are some examples:

> It does not matter that defense counsel never used the words "due process" when stating the objection. Such an omission, if one calls it that, is much like not specifically mentioning the Fourth Amendment when challenging the reasonableness of a search. In either situation, a trial court understands the point being made.
>
> United States v. Starks, 861 F.3d 306, 313 (1st Cir. 2017)

> No magic words such as "I object" are required. Only a reasonable indication of an objection is necessary to preserve error and it is evident to us that counsel's statement was an objection to the reading of the Creed. McCormick, Evidence s 115-116 (2d ed. 1972).
>
> People v. Pankey, 58 Ill. App. 3d 924, 926, 374 N.E.2d 1114, 1115 (4th Dist. 1978).

> Based on our review of the record, we conclude that Corona has met both the statutory and case law requirements for preservation. Although we recognize that an objection to an out-of-court statement as inadmissible hearsay will not preserve the Crawford issue, Williams v. State, 967 So.2d 735, 748 n. 11 (Fla.2007) (citing Schoenwetter v. State, 931 So.2d 857, 871 (Fla.2006)), we do not interpret our precedent as imposing a requirement that a defendant intone special "magic words" in order to preserve this

constitutional claim. See, e.g., Murray v. State, 3 So.3d 1108, 1117 (Fla.2009) (“While no magic words are needed to make a proper objection, the articulated concern must be ‘sufficiently specific to inform the court of the perceived error.’ ”) (quoting State v. Stephenson, 973 So.2d 1259, 1262 (Fla. 5th DCA 2008)); see also Evans v. State, 838 So.2d 1090, 1097 n. 5 (Fla.2002) (holding that failure to specifically assert a Sixth Amendment challenge will not preclude appellate review where the hearsay objection “is closely related to the right of confrontation”). Rather, as denoted in our statutes, an issue is preserved where it is timely raised and ruled on and apprises the court of the relief sought and the basis for that relief. The record in this case demonstrates that the trial court was well aware of the nature of the objections when it overruled the objections on the basis of its prior rulings concerning A.C.'s statements. Importantly, the court's prior ruling concerning the exclusion of A.C.'s statements was based in part on the court's rejection of Corona's confrontation argument. Thus, it is clear to this Court that Corona's later hearsay objection “fairly apprised the trial court of the relief sought and the grounds therefor.” § 924.051(1)(b), Fla. Stat. (2002). In light of the unique facts in this case, we conclude that Corona's confrontation violation was preserved.

Corona v. State, 64 So. 3d 1232, 1242–43 (Fla. 2011)

Despite Longstreet's use or not of the magic words, “Fourth Amendment,” or “Section 23,” there is no doubt that Longstreet is seeking protection of his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution of 1890. His objection is extremely apparent from the context. Hooker v. State, 516 So.2d 1349, 1354 (Miss.1987). Longstreet's allegation of error is preserved for our review, and now on to the merits of the case.

Longstreet v. State, 592 So. 2d 16, 18–19 (Miss. 1991)

And this is useful to illustrate how constitutional challenges are easier to preserve (although this pertains only to statutory challenges):

In general, a constitutional challenge to a criminal statute can be raised at any time. People v. Bryant, 128 Ill.2d 448, 454, 132 Ill.Dec. 415, 539 N.E.2d 1221 (1989). Accordingly, J.W. has not waived his

> constitutional challenges to the Registration Act even though he first raised those challenges in the appellate court.
>
> In re J.W., 204 Ill. 2d 50, 61–62, 787 N.E.2d 747, 754 (2003)

Appellant contends that in the instant case, the complained of excluded evidence would have aided the jury in assessing the complainant's credibility, and the trial court erred in sustaining the State's objection.

The excluded evidence was relevant; the trial court should have performed the balancing test of Evidence Rule 403: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." The "probative value" of evidence refers to "how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with **the proponent's need for that item of evidence**." Casey v. State, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007), citing Gigliobianco v. State, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006) emphasis added. "In keeping with the presumption of admissibility of relevant evidence, trial courts should favor admission in close cases." Casey, citing Montgomery v. State, 810 S.W. 372, 389 (Tex. Crim. App. 1991) (op. on reh'g). The Montgomery court also said that "reviewing the trial court's judgment for abuse of discretion requires more of an appellate court than

deciding that the trial judge did in fact conduct the required balancing and did not simply rule arbitrarily or capriciously. The appellate court must measure the trial court's ruling against the relevant criteria by which a Rule 403 decision is to be made." Montgomery at 392. Here, the trial court abused its discretion in excluding this relevant evidence.

As the prosecutor told the jury, consent was the key issue in this case. The ability of the complainant to remember the events is also crucial; and the trial court's ruling limited Appellant's ability to offer evidence about this as well. These rulings by the trial court served to deny Appellant a fair trial.

Appellant was harmed by the trial court's ruling; this ruling affected a substantial right of Appellant in a negative way: "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). The trial court's action in excluding this relevant evidence influenced jurors in their decision. Appellant was harmed, and the Court of Appeals was correct to reverse the conviction.

As the Court of Appeals said, the "Complainant's testimony, recollections, judgments of reality, and conduct rendered her claims of rape suspect and not worthy of belief."

The numerous mentions by the complainant of "I don't remember" and "I heard screaming in my head" speak to why this Court has said "The scope of appropriate cross-examination is necessarily broad. A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias or interest for the witness to testify...The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony for the purposes of helping to establish one side of the cause only." Carroll at 497-98.

Here, Appellant sought to introduce evidence that would help the jury see both sides of the cause. These matters were brought to the trial court's attention at the earliest opportunity to make the trial court aware of the evidence sought to be admitted. The trial court made adverse rulings.

CONCULUSION

The jury heard the complainant say many times that she had been drinking and didn't remember what happened and heard voices in her head. The excluded evidence would have assisted jurors in reaching their verdict. This is a textbook case of a State's case with holes, and then the defense attempting to put on vital defensive evidence, only to be thwarted each time by the actions of the prosecutor and the trial court, in a case which the prosecutor acknowledged came down to the

credibility of the complainant. In both this Court and the Court of Appeals, the State has argued preservation. The Court of Appeals reached the correct decision, following the precedent of this court in Johnson, Hammer, Carroll, Virts and Bryant, as well as Evidence Rule 103. This case presents an opportunity for this Court to state clearly, that the Texas criminal justice system is fair to all.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Honorable Court dismiss the PDR as improvidently granted, or, in the alternative, affirm the judgment of the Court of Appeals reversing the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 2nd day of May, 2018, a true and correct copy of the above and foregoing Appellant's Brief On the Merits was delivered to the Tarrant County District Attorney's Office, Post-Conviction Division at CCAAppellateAlerts@tarrantcountytx.gov; the State Prosecuting Attorney at information@spa.texas.gov and the Appellant.

/s/ Don Hase
DON HASE
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In compliance with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that the Appellant's Brief On the Merits was prepared using Microsoft Word, and according to that program's word count function, the document contains 8,350 words.

/s/ Don Hase
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